Public Feedmill (M) Sdn Bhd (in liquidation) v Hai Yeu Hin

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D3-23-2633-88
VC GEORGE J
22 FEBRUARY 1994

Civil Procedure *— Appeal — Notice of appeal — Service under O 56 r 1 —Whether adjournment of hearing of appeal had effect of extending date of service — Rules of the High Court 1980 O 56 r 1*

Civil Procedure *— Appeal — Hearing — Whether hearing must be fixed within five days of decision appealed against — Rules of the High Court 1980 O 56 r 1*

Civil Procedure *— Appeal — Notice of appeal — Service — Delay of one year — Whether appeal could be proceeded with*

The plaintiff's application for summary judgment under O 14 of the Rules of the High Court 1980 ('the RHC') was dismissed by the senior assistant registrar and the plaintiff appealed to the judge-in-chambers. The respondent raised the preliminary objection that the appeal was not properly before the court as the notice of appeal issued pursuant to O 56 r 1 had not been served within the time period stipulated. Order 56 r 1(3) provides that unless the court otherwise orders, the notice must be issued within five days after the judgment, order or decision appealed against was given or made and served not less than two days before the day fixed for hearing the appeal.

The date of hearing of the appeal, ie the returnable date, stated in the notice was 12 October 1992. However, on that date, counsel for the plaintiff reported that the notice had not been served and he had the matter adjourned to 8 February 1993 on which date it was again, because of non-service, adjourned to 8 June 1993. It was only on 5 May 1993 that the notice was served on the respondent. Counsel for the respondent also sought to argue that for the appeal to have been properly before the court, it should also have been fixed for hearing within five days of the senior assistant registrar's decision.

Held, dismissing the appeal:

(1) Order 56 r 1(3) prescribes that service of the notice has to be effected two clear days before the returnable day for hearing the appeal and this requirement was not met. The two adjournments of the date of hearing of the appeal did not have the effect of nullifying the notice and per se does not have the effect of extending the date of service of the notice. Accordingly, the appeal could not be said to have been brought.

(2) The judgments relied on by counsel for the respondent to support his contention that the appeal should also have been fixed for hearing within five days of the senior assistant registrar's decision were based on the rules in respect of appeals from the registrar to

A the judge-in-chambers that was obtained in the pre-1980 period. The five days within which the appellant had to ensure that the notice of appeal was made returnable for hearing was obviously an unrealistic rule and an amendment of it was called for by replacing the old O 54 r 21 of the Rules of the Supreme Court 1957 with the present O 56 r 1 of the RHC.

B (3) Service of the notice was not effected until over a year after it was issued. Having regard to the fact that it is trite law that an O 14 application made after the defence has been filed should not be entertained unless an acceptable explanation for the delay is given, it can be clearly seen that it is incongruous that an appeal

C from a refusal to grant an O 14 judgment could be proceeded with as tardily as this appeal has been prosecuted.

Per curiam:

If in fact the notice was not returned by the court to the solicitor until

D after the date specified in the notice, the solicitor should invoke O 3 r 5 and seek a specific order of the court to extend the time for service of the notice.

[Bahasa Malaysia summary

E Permohonan plaintif untuk penghakiman terus di bawah A 14 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') telah ditolak oleh penolong kanan pendaftar dan plaintif telah membuat rayuan kepada hakim dalam kamar. Responden telah menimbulkan bantahan permulaan bahawa rayuan itu tidak dibawa dengan betul di hadapan mahkamah kerana notis rayuan yang dikeluarkan mengikut A 56 k 1 itu tidak

F disampaikan dalam had masa yang ditetapkan. Aturan 56 k 1(3) memperuntukkan bahawa melainkan jika diperintahkan selainnya oleh mahkamah, notis itu mesti dikeluarkan dalam masa lima hari selepas penghakiman, perintah atau keputusan yang rayuan dibuat terhadapnya itu telah diberi atau dibuat dan disampaikan tidak kurang dari dua hari

G sebelum hari yang ditetapkan untuk pendengaran rayuan itu.

Tarikh pendengaran rayuan itu, iaitu tarikh pengembalian, yang dinyatakan di dalam notis itu adalah 12 October 1992. Bagaimanapun, pada tarikh itu, peguam plaintif telah melaporkan bahawa notis itu belum lagi disampaikan dan beliau telah menangguhkan kes itu ke 8 February 1993 dan pada tarikh itu juga, kerana notis itu tidak

H disampaikan, kes itu telah ditangguhkan ke 8 June 1993. Hanya pada 5 May 1993 barulah notis itu telah disampaikan ke atas responden. Peguam pihak responden juga berhujah bahawa untuk sesuatu rayuan dibawa dengan betul di hadapan mahkamah, ia sepatutnya juga ditetapkan untuk pendengaran dalam masa lima hari dari tarikh

I keputusan penolong kanan pendaftar.

Diputuskan, menolak rayuan itu:

(1) Aturan 56 k 1(3) menetapkan bahawa penyampaian notis itu perlu dibuat dua hari genap sebelum hari pengembalian untuk

pendengaran rayuan itu dan keperluan itu tidak dipenuhi. Kedua-dua penangguhan tarikh pendengaran rayuan itu tidak mempunyai kesan membatalkan notis itu dan tidak secara per se melanjutkan tarikh penyampaian notis itu. Dengan demikian, rayuan itu tidak boleh dikatakan telah dibawa.

(2) Penghakiman atas mana peguam pihak responden telah bergantung untuk menyokong penegasannya bahawa rayuan itu sepatutnya ditetapkan untuk pendengaran dalam masa lima hari dari tarikh keputusan penolong kanan pendaftar adalah berdasarkan kaedah-kaedah mengenai rayuan daripada penolong kanan pendaftar kepada hakim dalam kamar yang wujud dalam tempoh pra-1980. Masa lima hari dalam mana perayu terpaksa memastikan bahawa notis rayuan itu dikembalikan untuk pendengaran rayuan itu jelas merupakan suatu kaedah yang tidak realistik dan suatu pindaan kepadanya telah dibuat dengan menggantikan A 54 k 21 Kaedah-Kaedah Mahkamah Agung 1957 yang lama dengan A 56 k 1 KMT sekarang.

(3) Penyampaian notis itu tidak dibuat sehingga lebih daripada satu tahun selepas ianya dikeluarkan. Memandangkan hakikat bahawa adalah undang-undang mantap bahawa suatu permohonan A 14 yang dibuat selepas pembelaan difailkan tidak seharusnya dilayan kecuali jika suatu penjelasan yang dapat diterima mengenai kelengahan itu diberikan, jelas dapat dilihat bahawa tidaklah sesuai jika suatu rayuan terhadap penolakan permohonan untuk penghakiman di bawah A 14 boleh diteruskan selewat seperti rayuan ini.

Per curiam:
Jikalau pada hakikatnya notis itu tidak dikembalikan oleh mahkamah kepada peguamcara hingga selepas tarikh yang ditetapkan di dalam notis itu, peguamcara itu sepatutnya menggunakan A 3 k 5 dan memohon untuk suatu perintah mahkamah yang spesifik bagi melanjutkan masa penyampaian notis itu.]

Notes
For cases on service of the notice of appeal, see 2 *Mallal's Digest* (4th Ed) paras 387–400.

Cases referred to
1 *Bell v The North Staffordshire Rly Co* [1878–79] 4 QBD 205 (distd)
2 *Gibbons v The London Financial Association* [1878–79] 4 CPD 203 (distd)
3 *Gooi Seang Tuck v Tan Peng Loon & Anor* [1959] MLJ 153 (distd)
4 *Hagemeyer Trading Co (Malaysia) Sdn Bhd v Gibson Trading Co & Anor* [1978] 2 MLJ 101 (distd)
5 *Lee Teck Huat v R & I Securities Sdn* [1978] 1 MLJ 187 (distd)

Legislation referred to
Rules of the High Court 1980 O 56 r 1(2), (3)
Rules of the Supreme Court 1957 O 54 r 21

KK Lai (*TH Su & Co*) for the plaintiff/appellant.
Edwin Lim (*KL Wong & Lim*) for the defendant/respondent.

Cur Adv Vult

VC George J: In this appeal from a decision of the senior assistant registrar to the judge in chambers, the respondent takes a preliminary objection. He contends that the appeal is not properly before the court.

Enclosure (38) is the relevant notice of appeal. It was caused to be issued pursuant to O 56 r 1 by the plaintiff on 13 April 1992 in respect of its intention to appeal against the decision of the senior assistant registrar given on 9 April 1992 dismissing the plaintiff's O 14 application for summary judgment.

Order 56 r 1(2) provides that an appeal from the registrar to the judge in chambers shall be brought by serving on every other party in the proceedings in which the judgment, order or decision was given or made, a notice in Form 114 to attend before the judge on a day specified in the notice. The day specified in the instant notice for the parties to attend before the judge was 12 October 1992. That was the returnable date of the notice for hearing the appeal. Order 56 r 1(3) provides that unless the court otherwise orders, the notice must be issued within five days after the judgment, order or decision appealed against was given or made and served not less than two days before the day fixed for hearing the appeal.

In the instant case, when the appeal was called on 12 October 1992 for hearing, counsel for the plaintiff/appellant reported that the notice had not been served and he had the matter adjourned to 8 February 1993 on which date it was again, because of non-service, adjourned to 8 June 1993. It was only on 5 May 1993 that the notice was served on the respondent.

The said 13 April 1992 being the fifth day after the said 9 April 1993, the notice was issued as required by the first limb of O 56 r 1(3), within the prescribed five days after the judgment. However, as has been seen, it was not served not less than two days before the returnable date for hearing, 12 October 1992. It was submitted that it follows that the appeal was not properly before the court.

In support of his preliminary objection, counsel for defendant/respondent also sought to rely on para 56/1/4 of *Mallal's Supreme Court Practice* (2nd Ed) which is a commentary on the Rules of High Court 1980, to submit that if the appeal was to be properly before the court it should have been fixed for hearing within five days of the registrar's decision. This paragraph in *Mallal's* purports to construe the effect of the phrase in O 56 r 1(3) 'within five days after the judgment, order or decision' as follows:

> 'Within five days after the judgment, order or decision': This rule provides that in an appeal from a registrar to a judge in chambers not only must the notice be taken out within five days from the registrar's decision but it must be made returnable for hearing before the judge within this period.

The learned author of *Mallal's* (2nd Ed) cites two English authorities, *Bell v The North Staffordshire Rly Co*[1] and *Gibbons v The London Financial Association*,[2] respectively, and a 1959 and two 1978 Malaysian cases, *Gooi Seang Tuck v Tan Peng Loon & Anor*,[3] *Hagemeyer Trading Co (Malaysia) Sdn Bhd v Gibson Trading Co & Anor*[4] and *Lee Teck Huat v R & I Securities Sdn*,[5] in support of the above construction of the phrase. A

With respect, I have to point out that even a cursory examination of the sub-rules of O 56 r 1 shows that such a construction of the phrase in the context of O 56 r 1(3) from which it is taken is clearly erroneous. The explanation for this obvious and (because it is obvious) curious error must be that it was overlooked that all those said judgments relied on in that paragraph in *Mallal's* were based on the rules in respect of appeals from the registrar to the judge in chambers that obtained in the pre-1980 period. In Malaysia, we had the old Rules of the Supreme Court 1957, O 54 r 21 of which provided that: B C

> Any person affected by an order or decision of a Registrar may appeal therefrom to a Judge at Chambers. Such appeal shall be by notice in writing to attend before the Judge without a fresh summons, within five days after the decision complained of, or such further time as may be allowed by a Judge or Registrar ... D

The five days within which the appellant must ensure that the notice of appeal is made returnable for hearing was obviously an unrealistic rule and an amendment of it was called for. In England where they had a similar rule before 1965, the amendment was made in the new Rules of the Supreme Court 1965 by the doing away with the old O 54 r 21 and replacing it in 1965 with the new O 58 r 1 which we, in Malaysia, adopted in 1980 as our O 56 r 1 in our Rules of the High Court 1980. In *The Supreme Court Practice 1973* (the White Book), on the commentary on O 58 r 1, the learned authors point out at para 58/1/1: E F

> Effect of rule 1 — This rule is taken from the former O 54 r 21 but it makes a more realistic provision as to the time for the issue and service of appeal to the judge in chambers.

Now, although the commentary at para 56/1/4 of *Mallal's* does not assist counsel for the respondent/defendants on his preliminary objection, I think for other reasons, also relied on by counsel for the defendants, the objection is well founded. G

It is the policy of the rules of procedures of the courts that if there is to be an appeal against the decision of a court, it has to be brought within a limited and prescribed period. As has been seen, O 56 r 1 prescribes that, unless otherwise ordered, the notice should be caused to be issued within five days after the judgment, order or decision and that the notice will have on it specified the returnable date which date is clearly for hearing the appeal. H

In the instant notice of appeal, what is prescribed is that the parties 'attend before the judge in chambers on 12 October 1992 at 9am on the hearing of an application by the said plaintiff that the plaintiff's application for final judgment be allowed with costs'. The point is emphatically brought home when one considers what would happen if the notice was duly served I

A and the respondent is absent on the return date. There can be no doubt that it would have been open to the judge to proceed to hear and dispose of the appeal then and there on the basis that the respondent is absent though duly served.

Order 56 r 1(3), as has been seen, prescribes that service of the notice has to be effected two clear days before that specified day. And as has been B seen, this requirement was not met.

The 'unless the court otherwise orders' part of O 56 r 1(3) does not help the appellant because that has reference to the time for the issue of the notice. Here the notice was issued, as has been seen, on 13 April 1992. There was no order in respect of the issue of the notice pursuant to O 56 C r 1(3) or at all. The two adjournments of the date of hearing of the appeal has not the effect of nullifying the notice that had been issued on 13 April and per se does not have the effect of extending the date of service of the notice.

One hypothetical but relevant question that was posed by counsel was what happens if in fact the notice was not returned by the court to the D solicitor until, say, after the date specified in the notice. The answer to that is that the solicitor should invoke O 3 r 5 and seek a specific order of the court to extend the time for service of the notice.

The salutariness of the need to effect service of the notice of appeal within a prescribed period is brought home by the facts of the instant case. E Having caused the notice to issue on 13 April 1992, service of it was not effected until over a year later on 5 May 1993. Until the service of the notice was effected, the defendant/respondent was not aware of the fact that the plaintiff had the intention of appealing. Counsel pointed out that that was why the defendant had presented for taxation its bill of costs in respect of the dismissal of the plaintiff's application for summary judgment. For F over a year, the defendants had not realized that they had hanging over their heads an appeal. It is relevant to look at the policy of the rules in respect of the time for the bringing of O 14 applications. There are a number of judgments that have laid down and it is now considered trite that an O 14 application made after the defence has been filed should not be entertained G unless an acceptable explanation for the delay is given. Having those judgments in mind, it can be clearly seen that it is incongruous that an appeal from a refusal to grant an O 14 judgment could be proceeded with as tardily as this appeal has been prosecuted.

The clincher is seen in the words used in O 56 r 1(2) which are that the appeal shall be '*brought by serving* on every other party ... a notice ... to H attend before the judge on a day specified in the notice' (emphasis added). And, as had been seen, O 56 r 1(3) prescribes that the service must be effected not less than two days before the said returnable day for hearing the appeal. In the instant case, the service was not effected as prescribed and accordingly the appeal cannot be said to have been 'brought'. On the I preliminary objection, the appeal is struck off with costs.

Appeal dismissed.

Reported by Anne Khoo